Supreme Court, U. S.
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No. 96-97

In The

Supreme Court of the United States

October Term, 1995

CENTRAL REGIONAL SCHOOL DISTRICT,

Petitioner,

vs.

M.C. AND G.C. on behalf of their son, J.C.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether there is a split of authority within the federal circuits with regard to the applicable standard for an award of compensatory education beyond the age of twenty-one to a handicapped student under the Individuals with Disabilities Education Act.

II. Whether the standard established by the Third Circuit to determine a court award of compensatory education should stand, where it is consistent with prior decisions of this Court and where adoption of a "gross deprivation" or "bad faith" standard would create an unfair disparity between the relief available to parents who can afford to fund appropriate placements for their children pending the outcome of litigation and the relief available to those parents who are financially unable to enroll their children in private schools and must, instead, seek compensatory education.

III. Whether this Court should review the valid factual findings of the District Court, as affirmed by the Third Circuit.

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COUNTER STATEMENT OF THE CASE

The opinion of the Court of Appeals sets forth the facts of this case and in the interest of brevity, J.C. respectfully directs the Court's attention to the appellate court's opinion.

Pursuant to United States Supreme Court Rule 15.1 J.C. notes the following misstatements of facts contained in the petition.

Contrary to Central Regional School District's (hereinafter "Central Regional") repeated assertions, although J.C. is classified as "Eligible for Day Training," this does not mean that there has been a finding that he is profoundly mentally retarded. (Petition at 1-2). Rather, New Jersey considers a child such as J.C. "Eligible for Day Training" if he is *functioning* profoundly below age expectations in the designated areas, regardless of what his intellectual potential may be. N.J.A.C. 6:28-3.5(6)iii.

Central Regional also erroneously states that New Jersey anticipates that all students classified as "Eligible for Day Training" will be placed in a day training center. (Petition at 2). In accordance with IDEA's requirements, New Jersey provides a continuum of alternative placements to meet the needs of all of its handicapped students, of which a day training center is only one option. *See* N.J.A.C. 6:28-4.2.

Central Regional falsely states that throughout these proceedings, "it has been uniformly recognized that J.C.'s extremely low levels of functioning have precluded his educators from being able to demonstrate an objectively measurable quantum of progress from one academic year to the next." (Petition at 9). As is clear from the District Court's opinion, J.C.'s expert, Dr. Dana Henning, testified that in an appropriate placement J.C. would make measurable progress. (Appendix 30a-33a, 36a- 39a).

Further, Central Regional misrepresents that there is no evidence in the record upon which to conclude that J.C. had "untapped potential" or that there is an educational program or intervention that could produce a greater quantum of progress for J.C. than he had experienced at Ocean County Day Training Center.[1] (Petition at 7-8, 10). There was considerable evidence in the record, including the testimony of Dr. Henning and J.C.'s school records, that showed that he had made significant progress before being placed at Ocean County Day Training Center. (Appendix 30a). The District Court accepted Dr. Henning's expert opinion that it was the inappropriateness of his day placement that had resulted in only fleeting progress and regression and that J.C. would progress if placed in an appropriate residential school. (Appendix 30a-33a, 36a-37a).

Finally, Central Regional mistakenly states that J.C. is a fourteen-year-old student. (Petition at 1). J.C. was fourteen years of age when his parents first filed for administrative due process in January 1993. He is now seventeen years of age.

REASONS FOR DENYING THE WRIT

This Court should deny the writ because no conflict exists among the federal circuits with regard to the legal standard to be applied when considering a handicapped student's IDEA claim for compensatory education beyond the age of twenty-one. Neither the Second Circuit nor any other circuit has adopted a "gross deprivation" or "bad faith" standard for compensatory education claims. Therefore, the Third Circuit ruling does not

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1. The District Court initially denied J.C.'s motion for summary judgment because it found that the "evidence that J.C. will be able to progress beyond his current level is tenuous." (Appendix 45a). After conducting an evidentiary hearing and in light of Dr. Henning's testimony, the District Court found as a factual matter that J.C.'s lack of progress and even regression in some areas was due to an inappropriate placement. (Appendix 36a-38a).

create a conflict among the circuits requiring resolution by this Court.

The Third Circuit decision is consistent with previous decisions of this Court and should be upheld as a logical means of enforcing the IDEA's guarantee of a "free appropriate education." A reversal of the Third Circuit ruling will create an inequitable disparity between parents who can afford to place their child in an appropriate placement pending the outcome of litigation and then seek reimbursement and parents who cannot advance the cost of an appropriate education but instead must seek compensatory education.

The Circuit Court's decision is based on the proper and fully substantiated factual findings of the District Court. Here, there is no question of law at issue that justifies the grant of a Petition for a Writ of Certiorari.

I.

NEITHER THE SECOND CIRCUIT NOR ANY OTHER CIRCUIT HAS ESTABLISHED A RULE REQUIRING A DEMONSTRATION OF "GROSS DEPRIVATION" OR "BAD FAITH" BY A SCHOOL DISTRICT TO SUPPORT AN AWARD OF COMPENSATORY EDUCATION BEYOND THE AGE OF TWENTY-ONE TO A STUDENT UNDER THE IDEA.

There is no split of authority within the federal circuits with regard to the applicable standard for an award of compensatory education beyond the age of twenty-one. Accordingly, there is no need for this Court to resolve the issue of the appropriate compensatory education standard. Notwithstanding the assertions of Central Regional, the published decisions of the circuit courts of appeals dealing with the compensatory

education issue do not require either "gross deprivation" or "bad faith." While there may arguably have been bad faith or gross procedural violations by the school districts in the cases cited by Central Regional, none of the courts have adopted a standard which holds that "gross deprivation" or "bad faith" is a prerequisite to an award of compensatory education.

Despite passing references in case law, there is no prevailing Second Circuit compensatory education standard which is at odds with the Third Circuit standard. The three Second Circuit cases which Central Regional asserts require a student to show "gross deprivation" in order to be entitled to compensatory education all involved the school districts' violation of procedural requirements. This case, in contrast, concerns Central Regional's substantive failure to provide J.C. with an appropriate education. Although the court in these three cases did refer to "gross procedural violations", it seemed to be using the term "gross" to exclude *de minimis* infractions of the procedural requirements. The Second Circuit did not establish a standard requiring "gross procedural violations" in any of these cases. Moreover, even if the court had established this standard for procedural violations, it did not even hint that "gross violations" would also be required where the school district had deprived the child of his/her substantive right to an appropriate education.

In *Burr by Burr v. Ambach*, 863 F.2d 1071, 1075 (2d Cir. 1988), cited by Central Regional as a case setting forth the "gross deprivation" standard, the school district's undue delay in conducting an agency hearing and in the administrative review of that decision was found to have violated IDEA's procedural requirements that a hearing decision be made within 45 days. In awarding one and a half years of compensatory education to make up for the educational time the student had lost while the case was being litigated, the Second Circuit noted, "[o]bviously,

the federal regulations were grossly violated in this case" by the delays in deciding plaintiff's case. The court, however, did not hold that gross deprivation by a school district was a prerequisite to an award of compensatory education or even state that its award of compensatory education was premised on the fact that the violation of procedural requirements was "gross." *Id.*

Similarly, although the court in *Mrs. C. v. Wheaton*, 916 F.2d 69, 75 (2d Cir. 1990) observed that the school district had "grossly violated" procedural requirements and that the student was entitled to compensatory education, it did not set a standard requiring "gross deprivation" or even refer in passing to what would be required if the child had been substantively deprived of an appropriate education.

In *Garro v. Connecticut*, 23 F.3d 734, 737 (2d Cir. 1994), the remaining Second Circuit Court of Appeals cited by Central Regional, the plaintiff alleged that the school district failed to comply with procedural requirements. However, the student in *Garro* did not even meet the eligibility requirements for special education, and the alleged procedural violations by the school district were "unspecified." *Id.* at 734. In those circumstances, the Second Circuit upheld the dismissal of Garro's claim for compensatory education. Again, the court did not set a standard requiring "gross deprivation" as a prerequisite to awarding compensatory education.

The absence of a "gross deprivation" standard within the Second Circuit is further evidenced by recent decisions in that Circuit awarding compensatory education where a handicapped student was substantively deprived of an appropriate education without first finding "gross deprivation" or "bad faith" by the school district. In *Straube v. Florida Union*, 801 F. Supp. 1164 (S.D.N.Y. 1992), for example, the court found that a student had been deprived of an appropriate education and awarded one year

of compensatory education, without any reference to a "gross deprivation" standard.

Melvin v. Bolton School District, 1996 U.S. App. LEXIS 2905 (2d Cir. 1996), also illustrates the absence of a "gross deprivation" or "bad faith" standard within the Second Circuit. In *Melvin*, the Second Circuit affirmed the award of three years of compensatory education beyond Melvin's twenty-second birthday for substantially the reasons stated in the Magistrate's Opinion and Order. Neither the Second Circuit nor the Magistrate's Opinion referred to any supposed "gross deprivation" standard or found that the school district had "grossly deprived" the student of her rights. (*See* Appendix, *infra*, 1a-11a). Further, although the Second Circuit in *Melvin* referred to its earlier decision in *Burr by Burr v. Ambach, supra*, it relied upon it only for the proposition that a court was authorized to grant "appropriate relief" or any "relief designed to ensure that the student is appropriately educated within the meaning of IDEA." *Id.*

As the above case law illustrates, there is no "gross deprivation" standard for an award of compensatory education within the Second Circuit. Similarly, no other circuit requires a showing of "gross deprivation" or "bad faith" as contended by Central Regional. *See* Perry A. Zirkel, *The Remedy of Compensatory Education under the IDEA*, 95 Ed. Law Rep. 483 (1995) (maintaining that, in general, the prerequisite of a compensatory education award is a simple finding that a child has received an inappropriate education).

In *Jefferson County Bd. of Education v. Breen*, 853 F.2d 853, 857-58 (11th Cir. 1988), cited by Central Regional, the Eleventh Circuit merely noted that compensatory education should be a deterrent to the unnecessary prolonging of litigation. *Breen* did not adopt a "gross deprivation" or "bad faith" standard and the

court made no finding that the Board's actions grossly deprived the student of a free appropriate education or evidenced bad faith. *See also Todd v. Andrews*, 933 F.2d 1576, 1584 (11th Cir. 1991) (holding that compensatory education is appropriate relief where responsible authorities have failed to provide a disabled student with an appropriate education).

Miener v. Missouri, 800 F.2d 749 (8th Cir. 1986) also fails to support the proposition that a handicapped student must show bad faith by the school district before being awarded compensatory education. In *Miener*, the Eighth Circuit held:

> Accordingly, we hold that the Plaintiff is entitled to recover compensatory educational services if she prevails on her claim that the defendants denied her a free appropriate education in violation of the EHA.

Id. at 754. *See also Pihl v. Massachusetts*, 9 F.3d 184, 190 (1st Cir. 1990) (holding that Plaintiff may claim relief in the form of compensatory education if he can prove that the school district denied him his right to a free appropriate education).

Thus, the Eleventh, Eighth and First Circuits, and now the Third Circuit, merely require a finding that the school district has denied a student a free appropriate education; no "gross deprivation" or "bad faith" is required. Accordingly, because there is no "gross deprivation" standard within the Second Circuit and because no other Court of Appeals has enunciated or followed a "gross deprivation" or "bad faith" standard, there is no conflict among the Circuits requiring resolution by this Court. Central Regional's petition for a Writ of Certiorari should therefore be denied.

II.

CENTRAL REGIONAL'S PETITION SHOULD BE DENIED BECAUSE THE STANDARD CREATED IS CONSISTENT WITH PREVIOUS DECISIONS OF THIS COURT AND PROPERLY TREATS ALL CLAIMANTS EQUALLY UNDER IDEA.

In this case, the Third Circuit held that a child's right to compensatory education accrues from the point that the school district knows or should know that the child's Individualized Education Program ("IEP") is inappropriate, excluding the time reasonably required for the school district to correct the problem. (Appendix at 16a). This holding is a logical extension of this Court's rulings in *Burlington v. Department of Education*, 471 U.S. 359, 370-71 (1985) and *Florence County v. Carter*, 126 L. Ed. 2d 284 (1993). In accordance with these decisions, parents who unilaterally place their children in private schools pending the outcome of litigation are entitled to reimbursement if the school district's proposed IEP was inappropriate and the private school provided the child with an appropriate education. The Third Circuit's holding in this case places students whose parents cannot afford to fund private school placements in the same position as those whose parents can afford to fund the cost of a private placement pending the outcome of litigation.

The "gross deprivation" or "bad faith" [2] standard would create an inequitable standard and would treat parents seeking reimbursement for funds paid in tuition to an appropriate private placement more favorably than those parents seeking

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2. Contrary to Central Regional's assertion, the Third Circuit standard does not conflict with its earlier decision in *Lester H.* Despite Central Regional's argument, *Lester H.* did not adopt a "good faith" standard. In fact, the court in *Lester H.* refused to decide the issue. *Lester H. by Octavia P. v. Gilhool*, 916 F.2d 865, 873 n.12 (3d Cir. 1990), *cert. denied*, 488 U.S. 923 (1991).

compensatory education because they lacked the funds to unilaterally place their child in an appropriate private school. *See Miener*, 800 F.2d at 753 ("We are confident that Congress did not intend the child's entitlement to a *free* education to turn upon their parent's ability to "front" its costs).

Federal courts have consistently rejected the notion of a different standard being required for compensatory education than for reimbursement. In *Miener*, the Eighth Circuit recognized the parallel purposes of reimbursement and compensatory education:

> We cannot agree with the defendant that they should escape liability for these services simply because Clyde Miener was unable to provide them in the first instance; we believe that such a result would be consistent neither with Burlington nor with Congressional intent. Like the retroactive reimbursement in Burlington, imposing liability for compensatory educational services on the defendants "merely requires [them] to belatedly pay expenses that [they] should have paid all along . . ."

Miener, 800 F.2d at 753. After citing the comparable nature of reimbursement and compensatory education, the court held that the student could receive compensatory education upon showing that she was denied a free appropriate education.

Similarly, in *Harris v. District of Columbia*, 1992 U.S. Dist. Lexis 11831 (D.D.C.), the court expressly refused to set forth a standard for compensatory education that differed from that of reimbursement and firmly stated that the standards should be alike:

> [The "gross violation" or "exceptional circumstances"] standard is not the applicable standard to use in analyzing a deprivation of education. The standard that the Supreme Court set forth in *Burlington* is applicable to the present case.

Id. at 107. As noted by the *Harris* court, in *Burlington* this Court did not demand that the plaintiff demonstrate a "gross violation" of IDEA to receive retroactive reimbursement. In the opinion of the *Harris* court, the same standard should be used when awarding compensatory education. Without finding a gross violation of the IDEA by the school district, the *Harris* court awarded plaintiff one year of compensatory education.

Citing *Harris*, and *Burlington*, the court in *McManus v. Wilmette School District*, 1992 U.S. Dist. Lexis 18167 (N.D. Ill.) concurred that the standard for relief only requires a showing that a child falls within the IDEA and has been deprived of an appropriate education. Consequently, "the absence of a 'bad faith' allegation [did] not sound the death knell of plaintiffs' amended complaint." *Id.* at 488.

Finally, the District of New Hampshire has also held:

> [T]he test for the propriety of a compensatory education award simply requires the Court to determine whether the local educational agency has failed to provide a disabled student with an appropriate IEP.

Manchester School District v. Christopher B, 807 F. Supp. 860, 871 (D.N.H. 1992). As the above decisions illustrate, the Third Circuit rule reflects the logical reasoning that claimants who have been deprived of an appropriate education under the Act

should be awarded compensatory education based upon the same showing as a claimant seeking reimbursement for the cost of a private school tuition.

Central Regional argues that the Third Circuit's holding "will result in an award of compensatory education in spite of the district's ability to demonstrate appropriate IEPs and the provision of equally appropriate special education services in support of the IEPs." (*See* Petition at 7). Because a handicapped student seeking compensatory education must first establish that a school district has failed to provide the student with an appropriate education, Central Regional's assertion lacks merit. As this Court stated in the context of a reimbursement claim:

> There is no doubt that Congress has imposed a significant financial burden on States and school districts that participate in IDEA. Yet public educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice. This is IDEA's mandate, and school officials who conform to it need not worry about reimbursement claims.

Carter, 126 L. Ed. 2d at 293-94. The same reasoning holds true for compensatory education claims. Despite Central Regional's "parade of horribles," a school district that provides "appropriate special education services" need not worry about the Third Circuit standard.

The Third Circuit holding is a necessary and logical extension of this Court's rulings in *Burlington* and *Carter*.

Because the standard implements IDEA's guarantee of a "free appropriate public education," it should not be disturbed by this Court.

III.

THIS COURT SHOULD NOT REVIEW THE VALID AND PROPER FACTUAL FINDINGS OF THE DISTRICT OF NEW JERSEY, AS AFFIRMED BY THE THIRD CIRCUIT.

Well-established Supreme Court jurisprudence dictates that this Court not review the factual findings of this matter, as requested by Central Regional.[3] Where the Supreme Court is not acting as an initial appellate court its role centers exclusively upon declaring the supreme law of the land. *Moore's Federal Practice*, ¶ 52.12. "Under the established rule, this Court accepts the findings in which two courts concur unless clear error is shown." *Pick Mfg. Co. v. General Motors Corp.*, 299 U.S. 3 (1936) (*citing Stuart v. Hayden*, 169 U.S. 1, 14 (1898)). Similarly stated:

> A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.

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3. In the second portion of this petition, Central Regional asks the Court to review the "residential placement issue", alleging, "there is no basis in this case for a finding that J.C.'s educational needs require residential placement or that the day placement IEP offered and implemented by the Central Regional School District was not educationally appropriate under *Rowley*." (*See* Petition at 12).

Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271, 275 (1949).

Central Regional is thus asking this Court to reconsider the factual issue of J.C.'s residential placement, an issue previously decided by the District Court and the Court of Appeals. Both courts validly concluded that J.C. was capable of making progress, that his fleeting progress and regression in some areas was due to an inappropriate education and that at this point, he required a residential placement for educational reasons. Because the courts below made valid factual findings, this Court should reject Central Regional's invitation to reconsider this issue.

CONCLUSION

It is respectfully submitted that Central Regional has completely failed to articulate any reason for the grant of its Petition for Writ of Certiorari. There is no conflict among the Circuit Courts of Appeals, the ruling of the Third Circuit was valid and proper and this Court is not the appropriate forum for the reconsideration of factual issues. Accordingly, Central Regional's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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August 16, 1996

APPENDIX A — OPINION AND ORDER IN *MELVIN ET AL. V. TOWN OF BOLTON SCHOOL DISTRICT ET AL.*

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

File No. 5:88-CV-58

Cindy Melvin, a minor, by and through her guardian and next friend, Gertrude Martell, and Gertrude Martell,

Plaintiffs,

v.

Town of Bolton School District, Town of Bolton School Board; Chittenden East Supervisory Union; Harold M. Boyden, individually and as Superintendent, Chittenden East Supervisory Union; and W. Craig Roskam, individually and as Special Education Coordinator, Chittenden East Supervisory Union,

Defendants.

OPINION AND ORDER

On March 7, 1988, Cindy Melvin ("Cindy") and her mother (collectively "plaintiffs") filed this action under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 *et seq.* (1988 ed. and Supp. IV) against the Town of Bolton School District and School Board, the Chittenden East Supervisory Union and its Superintendent Harold M. Boyden and its Special Education Coordinator W. Craig Roskam ("defendants"). Plaintiffs sought declaratory, injunctive and compensatory relief

for the defendants' failure to provide a free appropriate public education to Cindy as required by IDEA. On June 27, 1991, the parties entered into a Consent Decree which granted most of the relief which plaintiffs sought. However, the parties specifically reserved for later determination the issues of attorneys' fees and relief for Cindy after the age of twenty-two. Cindy has now turned twenty-two. Plaintiffs seek three additional years of education to compensate Cindy for a like period when defendants concededly deprived her of a free appropriate public education. The parties have consented to proceed before a Magistrate Judge for any and all proceedings in this case, including an Order of final judgment. 28 U.S.C. 636(c).

Plaintiffs have filed a motion for summary judgment claiming that because the defendants have violated IDEA, as a matter of law Cindy is entitled to relief. Defendants have filed a response to plaintiffs' motion, arguing that Cindy is no longer covered by IDEA and even if she is, she is not entitled to three years of compensatory education. For the reasons stated below, I grant plaintiffs' motion.

BACKGROUND

I. *Statutory Framework*

IDEA gives all disabled students who qualify, the right to a "free appropriate public education" (FAPE) from ages three through twenty-one. 20 U.S.C. §§ 1400(c) & 1401(a)(18)(1988 ed. & Supp. IV); 34 C.F.R. § 300.122 (1993); *Burr v. Ambach*, 863 F.2d 1071 (2d Cir. 1988), *vacated sub. nom., Sobol v. Burr*, 492 U.S. 902 (1989), *reaff'd*, 888 F.2d 258 (2d Cir. 1989), *cert. denied*, 494 U.S. 1005 (1990).

Appendix A

IDEA requires the involvement of the child's teachers, parents, and a representative of the local educational agency in the development of an "individualized education program" I (IEP). 20 U.S.C. § 1401(a) (20) (1988 ed. & Supp. IV). The "special education" program set forth in an IEP must be "specially designed instruction . . . to meet the unique needs of l a child with a disability." § 1401(a) (16).

Parental notice is required whenever the educational agency proposes or refuses to change the child's educational placement. § 1415(b)(l)(C). Parents must be given an opportunity to bring complaints about any matter relating to the child's placement. § 1415(b) (1)(E). Complaints are reviewed at an impartial due process hearing conducted by the state or local education agency. 20 U.S.C. § 1415(c). However, "parents may bypass the administrative process where exhaustion would be futile or inadequate." *Honig v. Doe*, 484 U.S. 305, 326-27 (1988). An aggrieved party may finally appeal to federal or state court. 20 U.S.C. § 1415(e) (2).

II. *Factual and Procedural Background*

Cindy is severely emotionally disturbed, hyperactive and mentally retarded. She has a history of behavioral and emotional problems. Cindy has been eligible for special services under IDEA since 1976. Cindy was placed in a regional classroom for educable mentally retarded students from 1977 until 1982. In 1982, she changed schools and attended the Camel's Hump Middle School until June of 1985. She was placed in the Intensive Resource Room where she began to stabilize and make academic progress. In 1985, the Intensive Resource Room closed and Cindy returned to the regional program. Cindy's parents did not receive notice of the change in placement as

mandated by IDEA. Defendants also did not convene an IEP meeting to develop a program for Cindy. Defendants did not evaluate Cindy prior to the change. All of these requirements are mandated by IDEA.

Three weeks after her placement in the regional program an IEP meeting was held and it was determined that in order for Cindy to participate in the program, she needed an aide. Plaintiffs requested an aide, but defendants could not provide one. As a result, Cindy received some tutoring.[1]

The next school year, 1986 to 1987, Cindy was placed in the regional diversified occupations program in Essex Junction. Defendants failed to notify Cindy's parents of her new placement nor was an IEP meeting convened. Cindy again could not attend the program without the help of an aide. Defendants denied plaintiffs' request for an aide. Cindy stayed home and received the equivalent amount of home tutoring as in the previous school year. Finally, in school year 1987 to 1988, Cindy could not attend any placement without an aide. She received tutoring at home.

In 1988, Plaintiffs contacted an attorney to return Cindy to school. Cindy was sixteen years old by this time. Plaintiffs brought a complaint pursuant to 42 U.S.C. § 1983, alleging defendants had violated IDEA. (Paper 1). Plaintiffs alleged Cindy had been deprived of a FAPE for the school years 1985 through 1988.

The parties signed a Consent Decree on June 27, 1991, acknowledging that the defendants had violated the

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1. Cindy received approximately an hour and a half of tutoring for each school day.

requirements of IDEA. (Paper 25). After admitting liability, the defendants agreed to provide Cindy with her FAPE (her statutory right) until her twenty-second birthday, specifically referencing Cindy's IEP team and its functions. Defendants also agreed to pay plaintiffs' attorneys' fees accrued prior to April 1, 1991.

In the Consent Decree the parties agreed to reserve the issues of appropriate relief after Cindy's twenty-second birthday and attorneys' fees accrued after April 1, 1991.

> 1. Resolution of the issue of relief subsequent to Cindy Melvin's twenty-second birthday shall be reserved until November, 1992.
>
> 2. In November, 1992, the parties shall enter into negotiations regarding the relief subsequent to Cindy Melvin's twenty-second birthday for the Defendants' substantive and procedural violations as set forth in Section II above.
>
> 3. The relief provided may include only that allowed pursuant to applicable law.
>
> 4. If the parties are able to resolve the issue of relief through negotiation, their agreement shall be incorporated into a Consent Decree.
>
> 5. If the parties are unable to resolve the issue of relief through negotiations by January 15, 1993, the parties shall jointly move the Court for reinstatement of this

> action on the trial calendar of this Court for trial before the Magistrate.
>
> 6. The Plaintiffs' right to attorneys' fees accrued after April 1, 1991 shall be determined by applicable law.

Paper 25 at 8. Negotiations to resolve these issues were unsuccessful.

When Cindy was about to turn twenty-two, beyond the age specified for coverage under IDEA, plaintiffs feared defendants would attempt to "graduate" her, thereby terminating her special education. When negotiations failed, plaintiffs moved for a preliminary injunction to prevent defendants from terminating her services. This Court granted plaintiffs' motion on June 9, 1993, allowing Cindy to receive her special education pending resolution of the issue of additional compensatory education. (Paper 33).

Because in the Consent Decree defendants have admitted liability for violations of IDEA, the only issues before the Court are whether Cindy is entitled to further relief for the three-year period she was deprived of a FAPE and the amount of attorneys' fees subsequent to April 1, 1991.[2] Plaintiffs seek three more years of compensatory education. (Paper 34). Defendants argue that further compensatory education is inappropriate for Cindy. (Paper 39).

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2. Defendants' argument that Cindy is no longer entitled to the protections of IDEA because she is twenty-two was rejected by this Court when it granted plaintiffs' request for injunctive relief. *Opinion and Order*, slip op. (June 10, 3993).

Appendix A

DISCUSSION

I. *Summery Judgment Standard*

The purpose of summary judgment is to avoid useless trials by isolating and disposing of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Summary judgement is appropriate in those cases where the non-moving party has failed to produce any evidence of a genuine issue as to any material fact, and the moving party has rested his motion on a valid legal theory entitling that party to judgment as a matter of law. Fed. R. Civ. P. 56 (c). All ambiguities and inferences should be resolved in favor of the non-moving party. *Levin v. Analysis & Technology, Inc.*, 960 F.2d 314, 316 (2d Cir. 1992).

To defeat a motion for summary judgment, a party may not rest solely upon the allegations of the pleadings; the non-moving party must come forward with evidence that is more than colorable.[3] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). There is no issue for trial unless there is sufficient probative evidence which tends to support a claim or defense. *Id.*

II. *Remedies for Violation of the IDEA*

Once a court finds that "the public placement violated IDEA, it is authorized to 'grant such relief as the court determines is appropriate.' " *Florence County Sch. Dist. Four v. Carter*, 114 S. Ct. 361, 62 U.S.L.W. 4001, 4004 (U.S. 1993) (quoting 20 U.S.C. § 1415(e)(2)). In determining the nature of

3 Defendants have failed to oppose plaintiffs' statement of material facts by filing a separate statement of material facts in dispute, as required by Local Rule 5.

the remedy "the court must consider all relevant factors." *Id.* What relief is appropriate is subject to broad interpretation. *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 369 (1985); *Burr*, 863 F.2d at 1078. In *Burlington*, the Supreme Court held that appropriate relief included reimbursement of the cost required to keep a child in an appropriate educational setting when the state, in violation of the Act, had failed to do so. *Burlington*, 471 U.S. at 369. The Court found this relief appropriate because it would merely require the state to "belatedly pay expenses that it should have paid all along." *Id.* at 370-71. In *Florence County* the Court approved the reimbursement of reasonable private school costs to parents who unilaterally withdraw their child from an inappropriate public school placement. *Id.* at 4002. This remedy protects those parents who can advance the cost of special education when their school system has failed to adhere to IDEA. It fails, however, to protect those parents who are financially unable to enroll their child in a private school when the state fails to place the child in a timely manner. *Harris v. Dist. of Columbia*, No. Civ. A. 91-1660 RCL, 1992 WL 205103 (D.D.C. Aug. 6, 1992).

Compensatory Education

Because tuition reimbursement is a meaningless remedy for some plaintiffs, the federal courts have extended the meaning of "appropriate relief" to include compensatory education. This insures that parents who can not afford to unilaterally place their child in a private school will have a viable remedy. *Burr*, 863 F.2d at 1071; *Lester H. v. Gilhool*, 916 F.2d 865 (3rd Cir. 1990), *cert. denied*, *Chester Upland Sch. Dist. v. Lester H.*, 499 U.S. 923, (1991); *Hall v. Knott County Bd. of Educ.*, 941 F.2d 402 (6th Cir. 1991) *cert. denied*, 112 S. Ct. 982, (1992); *Miener v. Missouri*, 800 F.2d 749 (8th Cir. 1986).

Appendix A

In the Second Circuit compensatory education is an l acknowledged remedy. *See Mrs. C. v. Wheaton*, 916 F.2d 69, 75 (2d Cir. 1990) (compensatory education is an appropriate remedy to enforce [IDEA] educational rights). The court in *Burr*, explained its reasoning as follows:

> We do not believe that Congress intended to create a right without a remedy. If, in this case, we do not allow an award of compensatory education, then Clifford's right to an education between the ages of three and twenty-one is illusory. Clifford cannot go back to his previous birthdays to recover and obtain the free education to which he was entitled when he was younger.

Id. at 1078. Moreover, the United States Department of Education finds compensatory education an appropriate remedy.[4] Thus, in the case at bar, this Court has the discretion to award compensatory education if it is an appropriate remedy for Cindy.

I reject defendants' argument that Cindy has already been compensated for the loss of three years of a FAPE. An award of compensatory education under the Act does not include a period when the defendants were "already obligated to provide that student a free appropriate education." *Manchester School District v. Christopher B.*, 807 F. Supp. 860, 869 (D.N.H. 1992).

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4. Within the Department of Education, the Office of Special Educational Programs has stated that compensatory education is an appropriate remedy to ensure a child receives the FAPE to which he or she is entitled. 17 Educ. Hand. L. Rep. 522, 523 (1991).

Cindy was deprived of appropriate services for three years. If defendants had provided these services, their obligation would have ceased when Cindy reached the age of twenty-two. The defendants remain obligated to fulfill their legal duty to provide three years of services.

Defendants have stipulated to their liability and acknowledged they violated the requirements of IDEA. As a consequence of defendants' violations, Cindy was deprived of a FAPE for three years. Cindy can only be fairly compensated by allowing her to receive three years of compensatory services beyond her twenty-second birthday. Cindy's exact services are to be determined by her IEP team, as it is the best equipped to determine Cindy's special needs. As plaintiffs agree, these services need not be provided in a school environment if another educational model is determined by the IEP team to be more suitable to Cindy's needs.

This decision does not violate the terms of the Consent Decree. In the Consent Decree the parties agreed to disagree about the extent of compensatory education after Cindy reached the age of twenty-two. The parties provided that if they could not agree about this issue, they would request a ruling from the Court. The Court has reviewed the submissions of the parties and has determined that a hearing is not required.

CONCLUSION

Plaintiffs' motion for summary judgment is GRANTED. Cindy is entitled to three additional years of compensatory services beyond her twenty-second birthday. If the parties are unable to agree on the award of accrued attorneys' fees, they shall submit appropriate memoranda addressing this issue within 21 days of the date of this order.

Appendix A

Dated at Burlington, in the District of Vermont, this 30 day of December, 1993.

s/ Jerome J. Niedermeier
Jerome J. Niedermeier
United States Magistrate Judge